

## INDEX

---

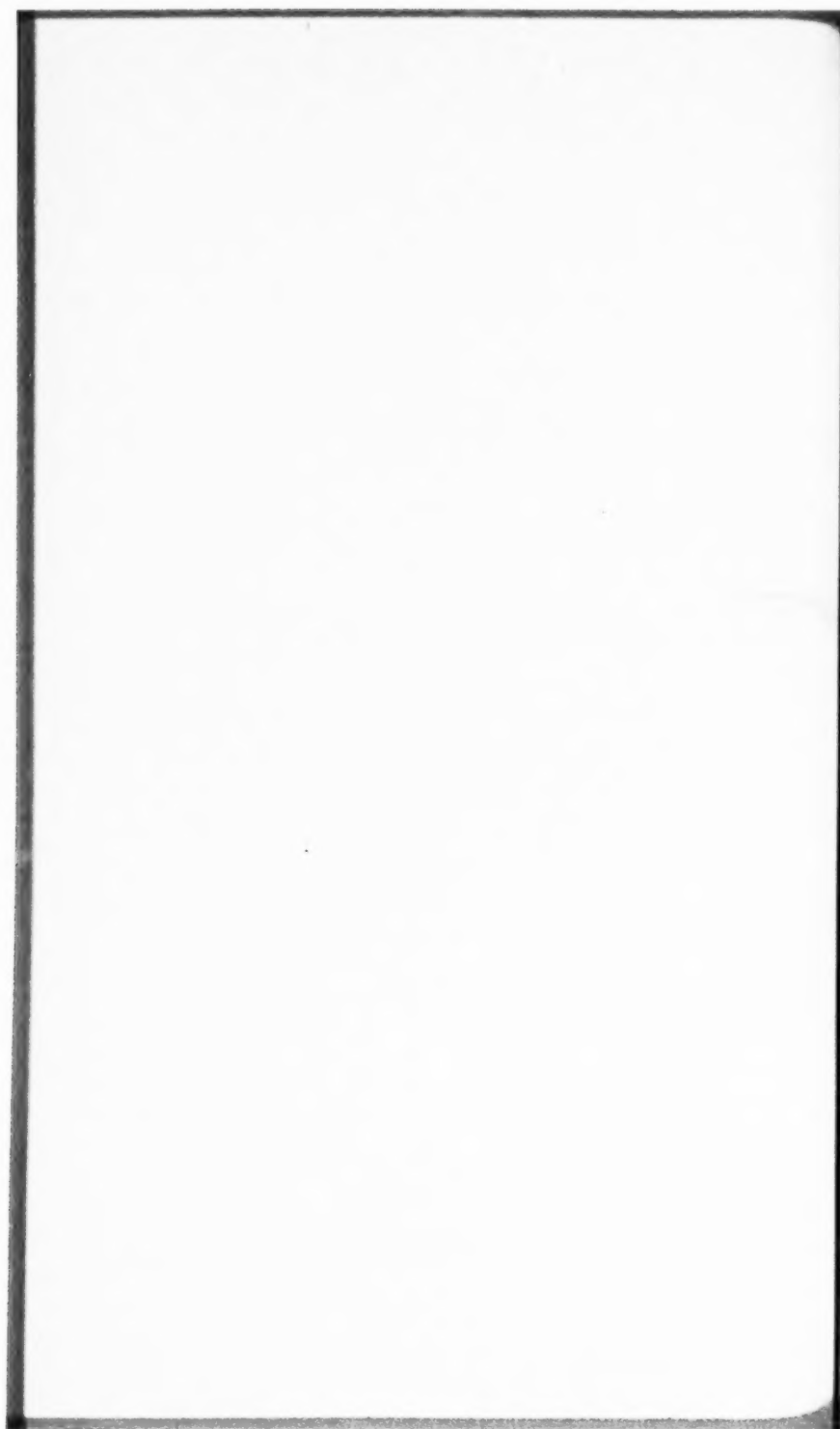
	Page
Opinion below.....	1
Jurisdiction.....	1
Statements of facts.....	2
Contentions of parties.....	9
Argument.....	
Under the terms of the contract the Government is not liable in damages for delays.....	9

### CASES CITED

<i>Chouteau v. United States</i> , 95 U. S. 61.....	11
<i>Haydnville Min. &amp; Mfg. Co. v. Art Institute</i> , 39 Fed. 484.....	11
<i>Plumley v. United States</i> , 226 U. S. 545.....	14
<i>Richard v. Clark</i> , 88 N. Y. Supp. 242, 43 Misc. 622.....	11
<i>Wells Bros. Co. v. United States</i> , 254 U. S. 83.....	10
<i>Wood v. United States</i> , 258 U. S. 120.....	10

### STATUTES CITED

Judicial Code, Section 242.....	2
Act of February 13, 1925, c. 229, 43 Stat. 936, 941.....	2
77241—26	
(1)	



# In the Supreme Court of the United States

OCTOBER TERM, 1925

---

No. 122

H. E. CROOK COMPANY, INC., APPELLANT

v.

THE UNITED STATES

---

*APPEAL FROM THE COURT OF CLAIMS*

---

**BRIEF FOR THE UNITED STATES**

---

## **OPINION BELOW**

The findings and opinion of the Court of Claims in this case were filed on April 28, 1924, and are reported in 59 Ct. Cls. 593. They appear in the transcript of record, pages 33 to 36, inclusive.

## **JURISDICTION**

The Court of Claims rendered a judgment, dated April 28, 1924, dismissing the petition and in favor of the United States in the sum of \$11.94 for costs. (R. p. 37.) An appeal by the plaintiff was allowed

(1)

on June 23, 1924, under Section 242 of the Judicial Code. (Later repealed by the Act of February 13, 1925, c. 229, 43 Stat. 936, 941.)

#### STATEMENT OF FACTS

The appellant commenced an action against the United States to recover the sum of \$15,224.03 as damages for the failure of the Navy Department to have ready buildings in which the appellant was to install heating systems. (R. pp. 1-32.) The facts as found by the Court of Claims, based upon the stipulation of the parties, may be briefly stated as follows:

On August 14, 1917, the appellant entered into a contract with the United States by which it agreed, in consideration of the payment of \$71,945, to furnish and install two heating systems, one in a foundry building and another in a machine shop building, which buildings were then under construction at the Navy Yard at Norfolk, Va., and to complete the work within 200 calendar days from the date of the delivery to it of the written contract. (R. pp. 1, 4, 33.) A copy of the contract was delivered to the appellant on August 31, 1917, thereby making the date of completion March 19, 1918. (R. p. 33.) A copy of the contract is attached to the petition (R. pp. 4-32) and is made a part of the findings by reference (R. p. 33).

The contract provided that the Navy Department should furnish outside hot-water flow and

return pipes. This was not done until March 1, 1919, almost one year after the original date set for the completion of the work. (R. pp. 33-34.) The buildings in which the heating systems were to be installed were not completed within the time contemplated when the contract was executed. The appellant could not therefore begin installation in the foundry building until May 27, 1918, and in the machine-shop building until August 15, 1918. (R. p. 34.)

It appears that the appellant, notwithstanding the breach of the contract on the part of the Government, went on with the work under the terms of the contract without making any demand upon the appellee either as to increased wages or as to the additional premium on the bond. (R. p. 36.)

The Government extended the contract time 387 days. (R. p. 34.)

During the prosecution of the work wages increased. The appellant paid the sum of \$6,439.86 for wages in excess of the amount it would have had to pay if the work had been begun upon the date contemplated for the commencement thereof. The appellant also paid to the surety company the sum of \$719.45 as an additional premium on the bond, which premium accrued subsequent to the completion date of said contract by reason of the extra time required for completing the installation of the heating systems. (R. p. 34.)

The work was completed on December 8, 1919, and accepted as satisfactory by the Navy Depart-

6 439 86  
719 45  
71 593

ment. The appellant received the full contract price of \$71,945. (R. p. 35.)

The specifications of the contract, which are made a part of the findings by reference, contain the following relevant provisions:

2. *General Intention.*— \* \* \* The foundry and machine shop buildings are now being erected. The approximate contract date of completion for the foundry is March 17, 1918, and for the machine shop is February 15, 1918. It is intended that the contractor for the heating shall work in conjunction with the general contractors to obtain the best possible results with the least interference or delay. The heating systems shall be completed on or before the contract dates for the completion of the buildings. (R. p. 5.)

\* \* \* \* \*

6. Damages for delay in accordance with the provisions of paragraph 13 of the "General Provisions," amended, shall be at the rate of \$20 per calendar day for each building. (R. p. 6.)

\* \* \* \* \*

11. *Continuance of Work After Time.*— It is mutually understood and agreed that in the event of the work not being completed within the time allowed by the contract, said work shall continue and be carried on according to all the provisions of said contract, unless otherwise directed by the Government, in writing, and said contract shall

*J. W. Crump & Sons*

*This means contractor can't stop & escape the  
by same clause.*

be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms. *Provided*, That neither an extension of the time beyond the date fixed for the completion of said work nor the permitting or accepting of any part of the work after said date shall be deemed to be a waiver by the Government of its rights to annul or terminate said contract for abandonment or failure to complete within the time specified or to impose and deduct damages as hereinafter provided. (R. p. 21.)

12. *Extension of Time.*—For causes of the character hereinafter enumerated extensions of time for the completion of the work may be allowed. Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once, with full report and recommendations, to the Navy Department, Bureau of Yards and Docks, for consideration and for such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated, shall be deemed and construed

as a waiver of all claims and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding. (R. p. 21.)

13. *Damages for Delay.*—In case the work is not completed within the time specified in the contract, or within such extension of the contract time as may be allowed, it is distinctly understood and agreed that deductions at the rate named in the specifications of the work shall be made as liquidated damages and not as penalty from the contract price for each and every calendar day after and exclusive of the date within which the completion was required up to and including the date of completion, said sum being specifically agreed upon as a measure of damage to the Government by reason of delay in the completion of the work; and the contractor agrees and consents that the contract price, reduced by the aggregate damages so deducted, shall be accepted in full satisfaction for all work done under the contract. (R. p. 21.)

14. *Unavoidable Delays.*—Unavoidable delays are such as result from causes which are beyond the control of the contractor, such as acts of Providence, fortuitous events, inevitable accidents, abnormal conditions of weather or tides or strikes of such scope and character as to interfere materially with the



progress of the work. Delays caused by acts of the Government will be regarded as unavoidable delays. Delays in securing delivery of materials, or by rejection of materials on inspection, or by changes in market conditions, or by necessary time taken in submitting, checking, and correcting drawings, or inspecting material, or by similar causes, will not be regarded as unavoidable. Should any delay in the progress of the work seem likely to occur at any time, the contractor shall notify the officer in charge in writing of the anticipated or actual delay, in order that a suitable record of the same may be made. (See par. 12.) (R. pp. 21-22.)

Paragraph 16 of the specifications provides that—

If at any time the progress of the work shall have been such as to show that the work cannot be completed within the time allowed, or should any provision of the contract be violated by the contractor—

the Government may declare the contract “null and void.” The paragraph also contains provisions as to the procedure to be adopted to protect the rights of the Government and to procure completion of the work in the event of the contractor’s default. (R. pp. 22-23.)

Paragraph 18 provides:

18. *Extras.*—The contract price shall cover all expenses, of whatever nature or description, connected with the work to be

done under the contract. Should the contractor at any time consider that he is being required to furnish any material or labor not called for by the contract, a written itemized claim for compensation therefor must be submitted by him to the officer in charge, who will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for decision and formal order covering approved items, if any. The failure or neglect of the contractor to present as above his claim for material or labor alleged to be extra within 60 days after being required to furnish or perform the same shall be deemed and construed as a waiver of all claim and right to additional compensation for the furnishing or performance of the alleged extra material or labor, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding. (R. p. 23.)

The Court of Claims, in dismissing the petition, made the following pertinent statements (R. pp. 35-36):

The facts found in this case are taken from the stipulations of the parties as to what the facts are. No evidence appears in the record, and the court is therefore compelled, in arriving at its decision, to rely upon the facts as agreed to by the parties.

What contract work had been done, if any, before the date for the completion of the

contract does not appear. What quantities of necessary materials had been purchased and delivered at the site and when they were purchased and delivered does not appear. What negotiations were entered into between the parties, when it was found that the work could not be begun on the date fixed in the contract, does not appear. What, if any, demand was made on the defendant for additional compensation by reason of the increase of wages, or when such a demand was made, if any, does not appear.

We draw no inference from the failure of the parties to include these relevant facts in the stipulations, except that without them the plaintiff must be held to have elected to go on with the work under the terms of the contract.

#### CONTENTIONS OF THE PARTIES

**The appellant contends that the "Government's breach (was) not waived by the contractor proceeding with the work."**

**The Government contends that under the terms of the contract it is not liable in damages for any delays.**

#### ARGUMENT

The appellant entered into a contract with the United States, which is made a part of the findings of fact by reference. (R. pp. 4-32, 33.) In this contract the rights and duties of the respective parties are to be found and are carefully defined. Under the terms of this contract the Government

was to furnish hot-water flow and return pipes and the buildings in which the heating systems were to be installed. There is no question as to the obligation of the United States to have these buildings ready for the appellant. The performance of this obligation on the part of the Government was merely a condition precedent to the duty of the contractor to install the heating systems within the period mentioned in the contract.

The parties to a Government contract may provide that the Government shall not be liable in damages for any delays caused by it. *Wells Bros. Co. v. United States*, 254 U. S. 83; *Wood v. United States*, 258 U. S. 120.

Before entering into this contract and by its very terms the appellant was informed that "the foundry and machine shop buildings are now being erected," that the contract dates for their completion were approximated or estimated, and that "it is intended that the contractor for the heating shall work in conjunction with the general contractors." (R. p. 5.) The possibility that either party might be the cause of delays was clearly considered by the parties to this contract, as shown by the provisions of the contract heretofore set forth at pages 4 to 7. In the event that the contractor failed to perform on time, it was specifically provided that it should be liable in damages "at the rate of \$20 per calendar day for each building." (R. p. 6.)

X/ The contract is silent about the imposition of liability on the Government for damages in the event that it is the cause of delays. The aforementioned paragraphs did provide, however, that where the Government is the cause of delays as determined by its own officers the contractor is entitled to extensions of time within which to perform; and such extensions were duly granted. 2

The reasonable conclusion is that the parties to this contract, contemplating possible delays caused, as in this case, by the inability of the Government to have the buildings ready or the hot-water tubes available because of the defaults of other contractors, saw fit not to provide for any liability on the part of the Government in damages for such delays. Under such provisions of the contract the Government is not liable in damages for the delays. *Chouteau v. United States*, 95 U. S. 61, 68; *Richard v. Clark*, 88 N. Y. Supp. 242, 43 Misc. 622; *Haydnville Min. & Mfg. Co. v. Art Institute*, 39 Fed. 484, 486.

Paragraph 11 of the contract expressly provides that in the event of the work not being completed within the contract time, said work should continue and be carried on "according to all the provisions of said contract" unless otherwise directed by the Government "and said contract shall be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms."

X The work was not completed within the contract time. It was completed afterwards by the appellant, who continued and carried on the work, according to the terms and provisions of said contract, without complaint or objection, and was paid the price therein stipulated. When the appellant elected to continue the work after time for performance had passed, it must be held to have elected to continue the work as provided in the contract "according to all the provisions of said contract," which included the price to be paid; and the appellant can not now be heard to complain or make further claim with respect thereto.

The contract clearly contemplates that there might be delays on the part of the contractor or on the part of the Government. It makes full provision for the remedies which the Government shall have in the event of a delay by the contractor. It also makes full provision that if the Government delays, the remedy which the contractor shall have is an extension of time, if seasonably requested. This right to an extension of time is the only right given to the contractor in the event of delays by the Government and was apparently intended to be the exclusive right of the contractor for any such delays. Therefore, when the contractor experienced these delays, the Government granted, as contemplated by the contract, additional time for the completion of the work. When such additional time was granted and the contractor completed the

work without objection or demand, the Government owed the contractor nothing further under the contract or the rules of law applicable thereto.

Moreover, paragraph 18 of the contract provides that "the contract price shall cover all expenses, of whatever nature or description, connected with the work to be done under the contract." (R. p. 23.) The cost of this work, as required by law, was thus sought to be fixed by and limited to the contract price. The only exception thereto concerning an increase in price is contained in the further provision that claims for additional compensation for "alleged extra material or labor" must be submitted in writing "to the officer in charge, who will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for decision and formal order covering approved items," that "the failure or neglect of the contractor to present as above his claim \* \* \* shall be deemed and construed as a waiver of all claim and right to additional compensation," and that "the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding."

The present claim is not one for additional compensation for alleged extra material or labor; but even if it could be so regarded, it does not appear that the contractor complied with the terms and conditions of this paragraph by properly present-

ing such claim, or why the finding and action of the Navy Department in rejecting such claim, if presented, should not be conclusive and binding on the appellant. *Plumley v. United States*, 226 U. S. 545.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,  
*Solicitor General.*

HERMAN J. GALLOWAY,  
*Assistant Attorney General.*

JOSEPH HENRY COHEN,  
*Special Assistant to the Attorney General.*

JANUARY, 1926.

